



DEPARTMENT OF THE NAVY  
BOARD FOR CORRECTION OF NAVAL RECORDS  
2 NAVY ANNEX  
WASHINGTON DC 20370-5100

BJG  
Docket No: 1483-99  
5 January 2000

[REDACTED]

Dear [REDACTED]

This is in reference to your application for correction of your naval record pursuant to the provisions of title 10 of the United States Code, section 1552.

A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 5 January 2000. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of your application, together with all material submitted in support thereof, your naval record and applicable statutes, regulations and policies. In addition, the Board considered the advisory opinion furnished by Headquarters Marine Corps, dated 5 November 1999, a copy of which is attached.

After careful and conscientious consideration of the entire record, the Board found that the evidence submitted was insufficient to establish the existence of probable material error or injustice. In this connection, the Board substantially concurred with the comments contained in the advisory opinion. Accordingly, your application has been denied. The names and votes of the members of the panel will be furnished upon request.

It is regretted that the circumstances of your case are such that favorable action cannot be taken. You are entitled to have the Board reconsider its decision upon submission of new and material evidence or other matter not previously considered by the Board. In this regard, it is important to keep in mind that a presumption of regularity attaches to all official records.

Consequently, when applying for a correction of an official naval record, the burden is on the applicant to demonstrate the existence of probable material error or injustice.

Sincerely,

W. DEAN PFEIFFER  
Executive Director

Enclosure



DEPARTMENT OF THE NAVY  
HEADQUARTERS UNITED STATES MARINE CORPS  
2 NAVY ANNEX  
WASHINGTON, DC 20380-1775

IN REPLY REFER TO:

1070  
JAM2  
05 NOV 1998

MEMORANDUM FOR THE EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF  
NAVAL RECORDS

Subj: BOARD FOR CORRECTION OF NAVAL RECORDS (BCNR) APPLICATION  
IN THE CASE OF FORMER [REDACTED]  
[REDACTED]/3043 U.S. MARINE CORPS

Ref: (a) SECNAVINST 1900.7G  
(b) SECNAVINST 1910.4B  
(c) MCO P1900.16E (MARCORSEPMAN)

1. We are asked to provide an opinion on Petitioner's request for review of the propriety of his administrative separation with a General (Under Honorable Conditions) characterization of service based on a pattern of misconduct. We are also asked to provide an opinion on whether Petitioner was entitled to separation pay.

2. We believe that Petitioner's separation was legally correct. We also answer the question concerning separation pay in the negative. Our analysis follows.

3. Background

a. On 13 March 1997, Petitioner received nonjudicial punishment (NJP) for violating Article 92, UCMJ, disobeying an order to report to a service school, and for violating Article 86, UCMJ, for failing to go to the airport to board a flight to the service school. He was awarded a suspended forfeiture of \$418.00 pay per month for one month, and did not appeal. On 10 September 1998, Petitioner received NJP for violating Article 92 for being derelict in his duties by becoming intoxicated while on duty, and for violating Article 86 for a two-hour unauthorized absence. He was awarded forfeiture of \$922.00 pay per month for two months, 45 days of restriction, and 45 days of extra duties. Forfeitures in excess of \$400.00 pay per month for two months were suspended for 6 months, and Petitioner did not appeal. Unrelated to either of the NJP's, Petitioner also received adverse administrative counselings on 24 September 1997 for inadequate performance of duty, and on 12 June 1998 for dereliction of duty.

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b. On 16 September 1998, Petitioner was notified that he was being processed for administrative separation for a pattern of misconduct, specifically, the two NJP's and the adverse counselings of 24 September 1997 and 12 June 1998. He was also advised that the recommended characterization of service was Under Other Than Honorable Conditions. Petitioner exercised his right to present his case before an administrative separation board, and was represented by a military lawyer. The board consisted of a U.S. Marine Corps major, a captain, and a U.S. Army first sergeant (E-8). The board found unanimously that a preponderance of the evidence established a pattern of misconduct, and unanimously recommended that Petitioner be separated with a General (Under Honorable Conditions) discharge. On 11 January 1999, Commander, Marine Forces Reserve, ordered Petitioner discharged as recommended. At the time of his discharge, Petitioner had in excess of 12 years of active service.

#### 4. Analysis

a. Petitioner is not entitled to any separation pay. A servicemember who is discharged involuntarily after serving more than six, but fewer than 20, years is entitled to separation pay unless the Secretary concerned determines that payment is not warranted under the circumstances. 10 U.S.C. § 1174(b)(1). In paragraph 9.m. of reference (a), the Secretary of the Navy (SecNav) specifically excluded enlisted servicemembers who are involuntarily discharged for misconduct from the class of persons otherwise entitled to separation pay upon involuntary discharge.

b. There was no legal defect in the processing of Petitioner's involuntary separation. Petitioner argues that he should not have been discharged for misconduct for which he received suspended punishments. The fact that portions of the NJP's were suspended is irrelevant to the issue of whether the board members could properly find that Petitioner engaged in the underlying misconduct, and whether they could then conclude that Petitioner had engaged in a pattern of misconduct that warranted separation with a General (Under Honorable Conditions) Discharge. Although we do note that the misconduct related to the first NJP was properly punishable only as a failure to go, in violation of Article 86, rather than as separate absence and orders violation offenses, this error cannot have prejudiced Petitioner before his Board since it would have been clear to

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any layman that the gravamen of the offense was an unauthorized offense.

c. Petitioner's assertion that separation was inappropriate in light of his record of performance before he was assigned to Inspector-Instructor, 1st Battalion, 14th Marines, is without merit. The Board considered Petitioner's previous record in reaching its conclusions, as did the separation authority in making his decision. The separation authority was within his discretion in deciding that Petitioner's misconduct outweighed any prior commendable service.

d. Petitioner also asserts that discharge was inappropriate because mitigating evidence concerning the 1992 death of his son, and the subsequent dissolution of his marriage, was not developed during the Board proceedings. This argument does not raise an issue warranting relief. Even if such an omission might have affected the outcome, Petitioner was free to raise those matters at the time; he cannot now claim an injustice when any omission was due to his own inaction.

e. Although not raised as error in the instant application for relief, Petitioner objected during the proceedings to having a U.S. Army enlisted member sit on the Board. We note as an aside that it was not error for the convening authority to detail First Sergeant [REDACTED], U.S. Army, to the Board. The only statutory limitation on administrative discharges of enlisted personnel is that they be effected in compliance with regulations promulgated by the Secretary concerned. 10 U.S.C. § 1169. The only requirement imposed by SecNav concerning enlisted board membership is that, under Part 5A.1 of reference (b), enlisted members be at least pay grade E-7 and be senior to the respondent. Petitioner's Board was constituted in accordance with paragraph 6315.1 of reference (c), which complies with the requirement established by SecNav. A first sergeant in the U.S. Army holds an enlisted pay grade of E-8, and Petitioner held pay grade E-6 at the time of his Board.

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5. Conclusion. Accordingly, for the reasons noted, we find no legal defect in the processing of Petitioner's case. We also note that Petitioner is not entitled to separation pay.

*M. W. Fisher, Jr.*

M. W. FISHER, JR.  
Head, Military Law Branch  
Judge Advocate Division